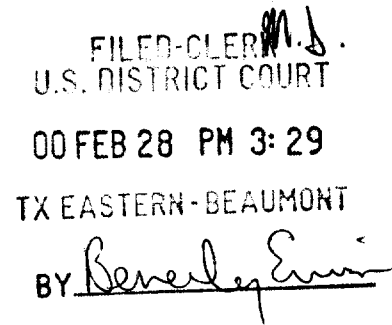


FEB 29 2000



IN THE UNITED STATES DISTRICT COURT

**CHARLES THURMOND, and
HAL LAPRAY,
Plaintiffs,
On Behalf of Themselves and All
Others Similarly Situated.**

V.

**COMPAQ COMPUTER
CORPORATION
Defendant.**

1:99CV0711 (TH)
JURY

ORDER DENYING MOTION TO RESTRICT FIRST AMENDMENT RIGHTS

Before this Court is *Compaq's Motion for Order Restricting Parties' and Attorneys' Statements to the Media or Public* [15]. Having considered the motion, the response, the reply to the response, and the arguments of counsel presented at the February 28, 2000 hearing, this Court DENIES *Compaq's Motion for Order Restricting Parties' and Attorneys' Statements to the Media or Public* [15].

1. Facts and Procedural History

On November 30, 1999 Plaintiffs Charles Thurmond and Hal Lapray (“Plaintiffs”) sued

99

Defendant Compaq Computer Corporation (“Compaq”) alleging Compaq “designed, manufactured, created, distributed, sold, marketed, or transmitted . . . FDC [“floppy diskette controllers”] microcode that can cause the unreported corruption or loss of data.” *Plaintiffs’ First Amended Original Class Complaint* [8] at p.3. “Plaintiffs purchased computers, or similar devices, sold or manufactured by Defendant, or that contain floppy diskette drives (‘FDDs’), floppy diskette controllers (‘FDCs’), or FDC instructions or commands in the form of microcode that were designed, sold, manufactured, transmitted or created by Defendant.” *Id.* at p.1. Plaintiffs seek injunctive relief and statutory damages under Title 18 U.S.C. § 1030 (the “Computer Fraud and Abuse Act”), revocation of acceptance under the Uniform Commercial Code (“UCC”), breach of contract and express and implied warranties, and declaratory relief under Title 18 U.S.C. § 1030. *Id.* at pp.10-15.

On January 28, 2000 Compaq delivered a plethora¹ of motions to this Court including *Compaq’s Motion for Order Restricting Parties’ and Attorneys’ Statements to the Media or Public* [15]. Compaq argues “This case will likely attract media attention. Plaintiffs’ counsel have already made statements to the media that serve to prejudice Compaq’s right to a fair trial in this forum. Compaq, therefore, moves for an order restricting the parties and their attorneys from making statements to the media or the public concerning the lawsuit in order to protect Compaq’s rights to a fair trial.” *Id.*

2. Law of Prior Restraint

“Prior restraints on speech and publications are the most serious infringement on First

¹This Court first considered calling the motions a “phalanx” of motions. However, the phalanx was a tight group of Greek infantry with an impenetrable shell of soldiers’ shields and a lethal extension of their lances capable of piercing the strongest of armies. Out of respect for the Greeks, this Court will not liken these motions to the Greek phalanx. So plethora, not phalanx.

Amendment rights.” Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1978). While it can be said that a threat of sanctions “chills” speech, prior restraint “freezes” it. The guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. Id. at 427 U.S. 570. Even in a criminal case, where the personal freedom of the defendant is at stake, a “gag” order restricting parties and witnesses from making extra-judicial statements about a case may only be entered where: (1) there is a ***clear and present danger*** to the fairness of the trial; (2) less restrictive alternatives are not adequate to mitigate the harm; and (3) the order would effectively prevent the threatened danger. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 563 (1978). Despite this incredibly high standard, Compaq nonetheless invites this Court to enter a “gag” order restricting the Plaintiffs and their attorneys—but not itself—from making statements to the media and the public. That is, Compaq wants this Court to issue a prior restraint on publication—“one of the most extraordinary remedies known to our jurisprudence.” Nebraska Press Ass’n, 427 U.S. at 562.

3. Analysis

Here we go again with another motion by Compaq that is rather lightweight. First, Compaq fails to cite a single published opinion from a *civil* case as authority for its proposition. See Nebraska Press Ass’n, *supra*; In re Application of Dow Jones & Company, Inc., 842 F.2d 603, 610 (2d Cir.1988), *cert. denied*, 488 U.S. 946 (1988); Pedini v. Bowles, 940 F.Supp. 1020, 1023 (1996); Gentile v. State Bar of Nevada, 501 U.S. 1030, 1070-71 (1991) (criminal cases all). Second, Compaq presents hardly any evidence at all that there is a clear and present danger to the fairness of the trial. What Compaq submits is the only quotes it could turn up from the Plaintiffs, their counsel, or witnesses. Here they are: ““As computers and the data they store play

a larger and larger role, we can not tolerate any conduct which might jeopardize the integrity of that data and the trust we must all have in that integrity,' says DeWayne Layfield, speaking for the legal team." *The Beaumont Examiner*, Nov. 4-10, 1999, page 5. The same article goes on to say: "Pleadings and allegations in lawsuits are contentions by attorneys, not statements of fact. It is up to a jury to decide which side is correct." *Id.* Pretty benign.

Let's look at what Compaq's been saying to the press:

Compaq called the charges "baseless" and said it will "vigorously defend itself" in the case. *Houston Chronicle*, Nov. 3, 1999; *Wall Street Journal*, Nov. 2, 1999; *Computerworld*, Nov. 8, 1999.

Compaq vows to fight the suit. *Infoworld*, Nov. 8, 1999.

"The complaint filed against Compaq appears to be a copycat suit filed in an attempt to exploit the recent settlement by Toshiba," Alan Hodel, a [Compaq] company spokesman said. *Houston Chronicle*, Nov. 3, 1999; *Wall Street Journal*, Nov. 2, 1999; *Infoworld*, Nov. 8, 1999.

One thing is clear: Attorneys for the plaintiffs shouldn't expect a similar outcome from Compaq and the others. "They're fishing," said Mike Winkler, senior vice president and group general manager for personal computers at Houston-based Compaq. "They're shopping around at the various companies hoping to find things during discovery." Winkler added that Compaq plans to "vigorously fight" the suit. *PC Week*, Nov. 8, 1999.

"We believe the vague claims that are outlined in the complaint are completely baseless and without merit," Compaq spokesman Alan Hodel said Tuesday.

"We're confident that Compaq products have no such problem." *Houston Chronicle*, Nov. 3, 1999; *Austin-American Statesman*, Nov. 3, 1999.

"We are confident Compaq products have no problems like those described in the Complaint." *Houston Chronicle*, Nov. 3, 1999; *Wall Street Journal*, Nov. 2, 1999.


Yesterday Compaq said its products did not contain faulty chips and that customers should not be concerned. *Financial Times (London)*, Nov. 3, 1999.

Despite having itself drank the sweet nectar of the First Amendment and relished in its refreshing freedom, Compaq nonetheless invites this Court to deny the Plaintiffs, their attorneys,

and their witnesses similar protection—even though it appears they’ve only sipped whilst Compaq has gulped.² Well, the First Amendment to the United States Constitution is not a switch that this Court can flip on and off at a litigant’s pleasure. Suffice it to say Compaq has sorely failed to demonstrate the need for its lop-sided, tactical gag order—“one of the most extraordinary remedies known to our jurisprudence.” Nebraska Press Ass’n, 427 U.S. at 562. Accordingly, this Court refuses to gag the Plaintiffs, their attorneys, and their witnesses while leaving Compaq’s, its attorneys’, and its witnesses’ First Amendment protection in place. Sauce for the goose.

Accordingly, this Court DENIES *Compaq’s Motion for Order Restricting Parties’ and Attorneys’ Statements to the Media or Public* [15]. However, Compaq may re-urge this motion at a later date should it become necessary.

Signed this 28th day of February, 2000.


Thad Heartfield
United States District Judge

²Incidentally, the circulation of just the *Houston Chronicle* in the Eastern District of Texas, Beaumont Division is 12,250 daily, 73,500 weekly (excluding Sunday). The circulation over the same division of *The Beaumont Examiner* is only 25,000 weekly.